Supreme Court of the United States.

OCTOBER TERM, 1904.

EMPIRE STATE-IDAHO MINING & DEVELOPING COMPANY and the AMERICAN BONDING COMPANY, OF BALTIMORE,
APPELLANTS

vs.

KENNEDY J. HANLEY,
APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

REPLY BRIEF ON MOTION TO DISMISS.

THIS CASE SHOULD NOT BE CONTINUED FOR ORAL ARGUMENT.

We earnestly request the Court to pass on the motion to dismiss at this time, for the following reasons:

1. This case has been before the Circuit Court of

Appeals for the Ninth Circuit five times on appeal and once upon an application for a writ of mandamus. After each appeal, excepting the last one, it has been further delayed by petition for re-hearing. *Two applications for certiorari have already been made to this Court* by the present appellants, and in each case the petition has been denied. In one petition they expressly stated that the case was not an appealable one. This case has been pending in the United States Courts altogether over six years. *Of that time the case has been in the Circuit Court of Appeals and in this Court four years and six months.* This Court has well said in speaking of the careless exercise of the power to issue certiorari:

"So exercised, it might burden the docket of this "Court with cases which it was the intention of Con- "gress to terminate in the Court of Appeals, and which, "if brought here would simply prevent that *promptness "of decision which in all judicial actions is one of the "elements of justice.*"

Where the situation is presented of a poor man fighting a wealthy corporation in the Federal Court for more than six years, this Court will well understand that to unnecessarily continue a motion to dismiss in a case over which this Court has no jurisdiction, would be in effect a denial of one of the elements of justice.

2. Ordinarily, "oral argument is not allowed on mo- "tions to dismiss appeals or writs of error, and we per- "ceive no reason for making exception to the general "rule in the case before us." *Carey v. Houston*, 150 U. S. This Court is a much better judge of its own jurisdiction than counsel on either side can possibly be. Its

jurisdiction depends upon the constitution, statutes and its own decisions. The jurisdiction of this Court on appeals from the United States Court of Appeals depends upon the application of the law to the facts *stated in the complaint*, and the relation of the parties to the questions there stated. The complaint is not long, and whatever assistance this Court might receive from counsel has been rendered in the briefs submitted by the respective parties. If counsel have omitted any argument which might be of assistance to the Court, why have they done so?

3. The appellee herein, at great expense to himself, upon the allowance of the appeal, promptly caused the entire record to be filed, the case to be docketed, and so much of the record as is necessary to an understanding of the case to be printed. This was all done for the purpose of disposing of the motion to dismiss at the earliest possible date. We understand that this Court always encourages diligence, particularly in a case such as this, where it has required more than six years of the most vigorous effort to undo a fraud which has been characterized as the grossest conceivable. (109 Fed. 722.)

MERITS.

The pretense that the complaint states but one cause of action will not stand analysis. The right to the respective interests depended upon different facts. The only justification for uniting the causes of action for the one-eighth interest and the one-third interest was that each cause of action related to the same mining ground

and was between the same parties. Supposing that the parties to this controversy were all citizens of the same state and there were sufficient allegations of a federal question as to the one-third interest to support jurisdiction in the Circuit Court over the case, would the Circuit Court thereby acquire jurisdiction of the one-eighth interest? Clearly not. This Court has held that if two causes of action are united and one of which is of such a nature that the Circuit Court could not determine it if brought in a separate bill of complaint, such Court will not acquire the power to dispose of it if united with a case clearly within the jurisdiction of the Circuit Court.

Mississippi v. Cohn, 150 U. S. 202.

See also:

Fourth Nat. Bank v. Stout, 113 U. S. 684.
Henderson v. Wadsworth, 115 U. S. 264.
Ex parte Phoenix Ins. Co., 117 U. S. 367.

We repeat what we have said in our opening brief, that the parties have always construed this case to be one the jurisdiction of the Circuit Court over which depended entirely upon diverse citizenship. No constitutional question was stated as to the one-third interest. But even if such a question had been stated it was never passed upon and as to that interest appellants secured a decree in their favor. The question, therefore, is not a substantial question within the rule that a constitutional question must not only be substantial from the nature of the proceedings invoked, *"but from the relation of the parties to them by whom they are invoked."*

Lampasas v. Bell, 180 U. S. 270.

Banker's Mut. Co. v. Minneapolis Co., 192 U. S. 371. (Appeal from Court of Appeals.)

In their brief counsel for appellants have labored heavily to convince this Court and themselves that there is a distinction between the right to appeal to this Court directly from the Circuit Court and the right to appeal to this Court from a Court of Appeals. They admit that it has been expressly settled that to authorize an appeal from the Circuit Court the constitutional question must be a real and substantial one, and can only be urged as a ground of appeal by one against whom it has been decided. They argue that appeals from the Court of Appeals may be taken notwithstanding that the constitutional question is not substantial and notwithstanding it was not passed upon.

Section 5 of the Act of 1891 gives a right of direct appeal from the Circuit Court in a case which "involves a constitutional question." The section does not say expressly that the question must have been decided one way or the other. Yet this Court has said that only the party against whom the question was decided may appeal.

Anglo Co. v. Davis, 191 U. S. 376.

Section 6 provides that appeals may be taken from the Court of Appeals to this Court where jurisdiction depended upon some grounds other than diverse citizenship. The jurisdiction of the Circuit Court exists only where diverse citizenship exists, or when the case "arises under the Constitution, etc." This provision does not expressly state that the question must necessarily be de-

termined in rendering judgment, yet this Court has held that the provision means that a decision of the constitutional question must be necessary to a decision by the Circuit Court, or else it is not a real and substantial question sufficient to found jurisdiction upon. If it must be necessarily decided by the Circuit Court, must it not have been passed upon in order to be the basis of an appeal to this Court from the Court of Appeals upon the ground that such a question was involved?

The Court of Appeals was created to relieve this Court of its burdens. It was provided that certain cases could be forced upon this Court's attention. Those cases were *such as necessarily required* a determination of a federal question. It was not intended to compel this Court to pass upon cases wherein a federal question was accidentally mentioned, but which had not been decided in the lower courts and which could not be decided by this Court if the case should be reviewed.

Counsel have failed here to show that a constitutional question was raised in the complaint even by accident. The allegations of the complaint did not necessitate a decision by the lower courts of any federal question in disposing of the case. Diverse citizenship existed, and questions of fact and general law determined the case. Moreover the pretended federal question was not alleged as a part of the course of action now involved, but as to another which we have abandoned. No appeal lies from the decision as to that cause. Four years have elapsed since it was decided.

APPEAL AS TO BONDING COMPANY.

The Bonding Company voluntarily appeared and made itself a quasi-party to the litigation by signing a supersedeas bond. Judgment was rendered against that company upon a petition and notice in a method similar to that followed in

Woodworth v. Northwestern Ins. Co., 185 U. S. 354; 119 Fed. 148.
Gordon v. National Bank, 53 Fed. 471.
Meredith v. Santa Clara Co., 60 Cal. 617.

The right of the Bonding Company to an appeal depends upon the right of the Empire State Company to an appeal.

Gregory v. Van Ee, 160 U. S. 643.
Carey v. Houston, 161 U. S. 127.

CERTIORARI.

Counsel ask this Court, in the event this appeal is dismissed, to issue a writ of certiorari. They refer to the petitions heretofore filed and briefs in support thereof. It is not now in order for appellants to ask this Court to grant a writ of certiorari upon the same grounds which were urged in a petition which has heretofore been denied. The rule as to petitions for re-hearing applies here with equal force to petitions for certiorari.

Williams v. Conger, 131 U. S. 390.

Two petitions for certiorari have already been presented and denied. Exhaustive briefs were filed on each

application. Each was denied. Why should a third be granted?

Each point now presented has been heretofore elaborately discussed by all parties,

1. The question of fact was determined by the evidence of the defendants themselves. The Circuit Judges had no doubt about it. It is not true that the Circuit Court "had the parties and witnesses before it." The entire evidence was taken four hundred miles from the presence of the District Judge.

2. The complaint sought a cancellation of a deed for fraud and the quieting of title and an accounting. Defendants entered upon a full defense on the equity side of the Court, and did not raise a question as to the adequacy of the legal remedy.

3. The decision as to the nature of the suit was not made "in a suit to which defendants were not parties." It was made in this case upon mandamus applied for to secure a construction of a previous mandate of the Court of Appeals. The defendants appeared by counsel and argued the case. The answer foreclosed the question discussed.

4. Defendants were admittedly guilty of a gross fraud. They asked to be allowed to recoup from the value of ores mined, while the fraud was in progress, the amount expended in its perpetration. The court of equity cared nothing for their losses and denied relief. Is it strange?

All of the questions were presented more than a year ago to this Court.

This case has never presented any questions of law of any public interest. There has been no conflict of decision between the Court of Appeals in this case and any other appellate court. The case has turned largely upon questions of fact and upon a construction of the pleadings. The questions which appellants have sought to raise in the various proceedings had been previously waived by them or expressly foreclosed by their own pleadings. We respectfully submit that there is no excuse for a writ of certiorari, much less the necessity for the issuance of such a writ. The appeal should be dismissed, and the litigation thus terminated.

"There must be an end to litigation some time and we think this is a good time to terminate it."

Respectfully submitted.

M. A. FOLSOM,
Counsel for Appellee.